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In the Supreme Court of the United States

OCTOBER TERM, 1927

Original No. 13

STATE OF CONNECTICUT

v.

COMMONWEALTH OF MASSACHUSETTS

IN EQUITY

MOTION FOR LEAVE TO FILE — MOTION TO CITE IN SECRETARY OF WAR AND CHIEF OF ENGINEERS AS PARTIES RESPONDENT.

BENJAMIN W. ALLING,
Attorney-General of the State of Connecticut.

OF COUNSEL,
ERNEST L. AVERILL,
Deputy Attorney-General.
BENEDICT M. HOLDEN,
Special Counsel.

THE CASE, LOCKWOOD & BRAINARD CO.
HARTFORD, CONN.

In the
Supreme Court of the United States

OCTOBER TERM, 1927

Original No. 14.

IN EQUITY

STATE OF CONNECTICUT

v.

COMMONWEALTH OF MASSACHUSETTS

MOTION FOR LEAVE TO FILE — MOTION TO CITE IN SECRETARY OF WAR AND CHIEF OF ENGINEERS AS PARTIES RESPONDENT.

The State of Connecticut, by its attorney-general, appearing in that behalf by and with the authority, consent and direction of the governor of said state, comes now here and presents this its motion for leave to file in this court a motion citing in the Secretary of War and the Chief of Engineers as parties respondent, and to have process issued thereon. A true copy of said motion is hereto attached.

STATE OF CONNECTICUT,
By BENJAMIN W. ALLING,
Its Attorney-General.

ERNEST L. AVERILL,
Deputy Attorney-General.
BENEDICT M. HOLDEN,
of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1927

NUMBER 14 — ORIGINAL

THE STATE OF CONNECTICUT, COMPLAINANT,

v.

THE COMMONWEALTH OF MASSACHUSETTS, DEFENDANT

IN EQUITY

MOTION TO CITE IN THE SECRETARY OF WAR AND THE CHIEF OF ENGINEERS AS PARTY RESPONDENTS AND FOR AN INJUNCTION

The State of Connecticut appearing herein by its Attorney-General, who appears as Attorney-General of the State of Connecticut by and with the authority, consent and direction of the Governor and the General Assembly of the State of Connecticut comes now here and presents its motion to this Honorable Court and says:

1. That the original bill of complaint, in which the State of Connecticut is Complainant and the Commonwealth of Massachusetts is Respondent, was filed by order of this Honorable Court at the October Term, 1927.

2. One of the averments in said original bill, filed as aforesaid, is as follows:

> "In compliance with the duty placed upon it by the compact between the original states, the United States has assumed the care and control of all navigable rivers and placed the immediate duty of exercising such care and control in the War Department of the United States

government and the office of the Secretary of War, and the acts and things hereinafter complained of, constituting as they do an interference with interstate commerce by affecting the navigability of the said Connecticut River, necessitates that permission should be obtained from the War Department and the office of the Secretary of War of the United States before any of the acts and things hereinafter complained of can be lawfully done by the Commonwealth of Massachusetts, which permission has not been obtained."

The Respondent, the Commonwealth of Massachusetts, in its answer filed in this Court makes the following claims:

"5. Answering the fifth paragraph, set forth on pages three and four, of the printed bill of complaint, the defendant admits that the United States of America, acting under the authority of the Constitution of the United States, by virtue of various acts of the Congress of the United States, has assumed the care and control of navigable rivers and has placed the greater portion of the duty of exercising such control in the War Department of the United States Government and the office of the Secretary of War; that the defendant denies that any acts and things which have been in fact done or which are in fact planned by the Commonwealth of Massachusetts, complained of in said bill of complaint, constitute in any way an interference with interstate commerce by affecting the navigability of the said Connecticut River, or that, in so far as concerns any rights or interests of the State of Connecticut or of the people thereof, there is any necessity that permission should be obtained from the War Department and the office of the

Secretary of War of the United States before any of the acts and things heretofore actually done or hereafter actually contemplated to be done by the Commonwealth of Massachusetts, referred to in said bill of Complaint, may be lawfully done by the Commonwealth of Massachusetts, but the defendant says that whether or not such permit is necessary rests solely within the jurisdiction of Congress and of the War Department, in so far as the powers of Congress have been delegated to that department. The defendant admits that at the time of the preparation of this answer permission from the War Department or from the office of the Secretary of War of the United States had not been obtained to do any acts actually done or contemplated to be done by the Commonwealth of Massachusetts, referred to in the bill of complaint, for which any permit may be by law required, but the defendant avers that it has filed with the Secretary of War applications for permits to make certain diversions of the waters of the Swift River and of the Ware River, which contemplated diversions are hereinafter more fully described. The defendant denies that any diversion of the waters of any other river in the watershed of the Connecticut River is contemplated or planned by it. The defendant denies each and every other material allegation of fact in said fifth paragraph of the bill of complaint, if any such there be." (Answer of Mass. pp. 5-7.)

11. Answering the eleventh paragraph, set forth on page six of the printed bill of complaint, the defendant says that it is ignorant as to whether the State of Connecticut is the owner of the bed of the Connecticut River within the territorial limits of the State of Con-

necticut and leaves the complainant to prove the same in so far as it be material; and further answering, the defendant avers that no question of whether any act done or contemplated to be done by the Commonwealth of Massachusetts had an adverse or injurious effect upon the navigability of the Connecticut River is here relevant or material, the determination of such issues having been committed by the Constitution of the United States to Congress, which has delegated its administrative powers to the War Department and the Secretary of War. Each and every other material allegation of fact, if any such there be, contained in the eleventh paragraph of the bill of complaint is denied by the defendant. (Answer of Mass. p. 10).

Fifth. That the allegations contained in the bill of complaint in many and divers places, with respect to any interference which may be caused by the said diversion with the navigability of the Connecticut River are in nowise material, relevant, and pertinent to this bill, inasmuch as exclusive control of navigable waters and regulation of obstructions and diminutions of navigable streams has been committed by the Constitution of the United States to the Congress of the United States, which in turn, has delegated under general rules administrative power over the said waters to the Secretary of War and the Department of War. (Answer of Mass. p. 30).

3. Under date of November 30th application for permits, prepared by David B. Keniston, Chairman of the Metropolitan District Water Supply Commission, presumably acting under authority given him by the Commission, were filed with the Secretary of War — said applications were as follows:

" U. S. Engineer Office
Providence, R. I.
Dec. 1-1927
Conn 54/157

U. S. Engineer Office
Division Engineer
N. E. Division,
New York

David B. Keniston,
Chairman
Charles M. Davenport
Joseph H. Soliday
Commissioners
Frank E. Winsor
Chief Engineer

COMMONWEALTH OF
MASSACHUSETTS
Conn 19/32
Metropolitan District
Water Supply Commission
24 School Street, Boston

Subject: WARE RIVER DIVERSION

War Department
United States Engineer Office
13th Floor, Custom House
Boston, Mass.

November 30, 1927
Office Chief of Engineers
Dec. 6-1927
7510 (Mass. Metro. Dist.
Water Supply Com'n. 1
Subs 1-4

Gentlemen:

The letter from your department, signed by S. A. Cheney, Colonel, Corps of Engineers, District Engineers, dated November 22, 1927, directed to this Commission in reference to the contemplated diversion of the waters of the Swift and Ware Rivers for the purpose of procuring an additional water supply for the Metropolitan District received.

The diversion of waters referred to is of the Ware River authorized by Chapter 375 of the Acts of 1926 (Massachusetts) and of the Swift River authorized by Chapter 321 of the Acts of 1927 (Massachusetts), both rivers being entirely within the State of Massachusetts and being non-navigable. Copies of both of these Acts are attached hereto.

In accordance with the letter from your department and as suggested by Colonel Cheney in a recent conference, this Commission hereby makes formal application for a permit for the diversion of the waters of the Ware River in accordance with the terms of Chapter 375 of the Acts of 1926 which provides so far as said diversion is concerned as follows:

'Section 1, Paragraph 2 — The commission on behalf of the commonwealth, shall forthwith for the purpose of extending and increasing the water supply of the Metropolitan water system, and of such cities and towns not members of the metropolitan water district as may hereafter require water from said system, divert into the Wachusett reservoir of said district the flood waters, as defined in section four, of the Ware River at a point in the town of Oakham or the town of Barre not more than one mile from the bridge of the Boston and Albany railroad crossing said river in the village of Coldbrook, and construct as a part of the metropolitan water system, such works as may be necessary for such extension and increase, and all structures and appurtenances incidental or complementary thereto; provided, that said flood waters shall not be so diverted between May thirty-first and December first in any year unless such diversion be first approved by the state department of public health.

'Section 4, Paragraph 1 — For the purpose of this act, the flood waters of the said Ware River which the commission is authorized to divert as provided in section one are hereby defined to be the waters thereof at and above the point of diversion established under section one in excess of a flow of eighty-

five million gallons a day, meaning thereby that on any day when the natural flow of said river is less than eight-five million gallons no water shall be diverted.'

"This matter was taken up by Mr. Winsor, Chief Engineer of this Commission, with Major Fowler of the Providence Office early in the year, and it was our impression that if anything further was required on the part of the War Department, we would be notified. Work has been going on since that time and in view of the immediate necessity of the Boston Metropolitan District for an additional water supply, and the serious danger of a water shortage unless this work is prosecuted to the earliest possible completion, we cannot too strongly urge that a permit be immediately granted.

Respectfully,

Metropolitan District Water Supply Commission

By: Davis B. Keniston (Sgd.)

Chairman

Incls.

DBK:CH"

Davis B. Keniston,
Chairman,
Charles M. Davenport,
Joseph H. Soliday,
Commissioners
Frank E. Winsor,
Chief Engineer

THE COMMONWEALTH OF MASSACHUSETTS
Metropolitan District
Water Supply Commission,
24 School St., Boston,
Nov. 30th, 1927.

SUBJECT — SWIFT RIVER DIVERSION

War Department,
United States Engineer Office,
13th Floor — Custom House,
Boston, Mass.

Gentlemen: —

The letter from your department signed by S. A. Cheney, Colonel, Corps of Engineers, District Engineer, dated November 22, 1927, directed to this Commission in reference to the contemplated diversion of the waters of the Swift and Ware Rivers for the purpose of procuring an additional water supply for the Metropolitan District received.

The diversion of waters referred to is of the Ware River authorized by Chapter 375 of the Acts of 1926 (Massachusetts) and of the Swift River authorized by Chapter 321 of the Acts of 1927 (Massachusetts), both rivers being entirely within the State of Massachusetts and being non-navigable. Copies of both of these Acts are attached hereto.

In accordance with the letter from your department and as suggested by Colonel Cheney in a recent conference, this Commission hereby makes formal application for a permit for the diversion of the waters of the Swift River in accordance with the terms of Chapter 321 of the Acts of 1927 which provides so far as said diversion is concerned as follows:

Section 1, 1st Paragraph — "The metropolitan district water supply commission, established by chapter three hundred and seventy-five of the acts of nineteen hundred and twenty-six, hereinafter referred to as the commission, on behalf of the commonwealth, shall forthwith, for the purpose of adding to, extending and further developing the additional sources of water supply of the metropolitan water system provided for in said chapter three hundred and seventy-

five, divert into the Wachusett reservoir of the metropolitan water system the waters of the Swift River, and of Beaver Brook a tributary of the Ware River, by the construction of an extension, to the Swift river, of the aqueduct or tunnel between the Wachusett reservoir and the Ware river at or near Coldbrook provided for in said chapter three hundred and seventy-five, and by the construction of a temporary diversion dam as may be required at a point on the Swift river below the confluence of the east and middle branches or at a point on the east branch near the village of Greenwich, and ultimately by the construction of a dam across the Swift river at or near the boundary line between the towns of Ware and Enfield, and of a dam across Beaver Brook at or near said boundary line, thereby creating a storage reservoir in the Swift river valley. No water shall be diverted or stored in any calendar day when the flow of the Swift river at or just above the village of Bondsville in the towns of Palmer and Belchertown is less than twenty million gallons; and there shall be discharged from any storage created by the commission above said village a sufficient amount of water to maintain, so far as such storage will allow, a flow of said river at said village of not less than twenty million gallons in each calendar day."

This matter was taken up by Mr. Winsor, Chief Engineer of this Commission, with Major Fowler of the Providence office early in the year, and it was our impression that if anything further was required on the part of the War Department, we would be notified. Work has been going on since that time and in view

of the immediate necessity of the Boston Metropolitan District for an additional water supply, and the serious danger of a water shortage unless this work is prosecuted to the earliest possible completion, we cannot too strongly urge that a permit be immediately granted.

Respectfully,

Metropolitan District Water Supply Commission
(By) (Sgd) Davis B. Keniston, Chairman.

These communications were intended by said Metropolitan District Water Supply Commission as applications for permits to divert the waters of the Swift and Ware Rivers in such a manner as would take said waters entirely away from navigation and forever remove such diverted water from the watershed of the Connecticut River and would use said water so diverted for the purposes other than in aid of navigation, and entirely remove said water as a future aid to maintain the navigability of said Connecticut River or increase it to its navigable capacity.

4. Said documents, or requests for permits hereinbefore recited were not accompanied by any plan or plans or specifications or explanatory drawings, charts or other descriptive data whatsoever.

5. Representatives of the State of Connecticut, learning that these applications for permits had been filed, requested an opportunity to be heard and to be given an opportunity to inspect the plans, designs or specifications, which under the law should have been filed for approval or disapproval of the Secretary of War and such applications and requests have been made to the Secretary of War in person and to the Chief of Engineers and various officers serving under them who have

been placed in charge of this investigation with the direction to make recommendations upon which the Chief of Engineers and the Secretary of War will predicate their official action.

6. The Secretary of War and the Chief of Engineers and their assistants have taken the position that it is not necessary that this applicant in applying for a permit to carry on the work and make the taking and diversion contemplated in this case, should file any plans or speculations to be examined and recommended by the Chief of Engineers and approved by the Secretary of War, and the Secretary of War and his subordinates have proceeded to make an investigation, in the course of which it has become apparent and has been proved to the Secretary of War and the Chief of Engineers that the applicant intends to take and will take a large quantity of water, which will be entirely diverted and removed from navigation and which removal effects the navigable capacity of the Connecticut River by taking said water out of the watershed of the Connecticut River.

7. The metropolitan District Water Supply Commission, acting for and in behalf of the Commonwealth of Massachusetts was created by Acts of the General Court of the Commonwealth of Massachusetts and its duties are defined and set forth in the act creating it, copies of which Acts are hereto attached and marked Exhibit "A" and "B" and by reference made a part of this paragraph. These acts have not been amended so as to enable the said Commission to do any acts or things in any manner other than that set forth and described in said Acts hereinbefore referred to.

8. While said applications for permits hereinbefore set forth were pending before the Secretary of War for action, representatives of the State of Connecticut informed the Secretary of War and the Chief of Engineers that the request for

the permission to divert waters of the Swift and Ware Rivers involved a diversion of the waters of both rivers and notwithstanding the fact that the requests for permits, asked for authority to divert water from both the Swift and Ware Rivers, the Secretary of War and the Chief of Engineers saw fit to separate the Swift River diversion project from the Ware River diversion project and to act upon each separately. Separate action on each of said rivers was not originally intended by the Metropolitan District Water Supply Commission, but was suggested by the representatives of the Secretary of War and the Chief of Engineers and discussion of the diversion of waters from both rivers as one project was refused and they claimed the right to hear evidence and to decide each question separately.

9. All of the evidence and information introduced by the representatives of the Commonwealth of Massachusetts or the representatives of the State of Connecticut and all the investigations conducted by the Secretary of War and the Chief of Engineers showed conclusively that the Respondent, the Commonwealth of Massachusetts, intended to erect obstructions in the Ware River and the Swift River and to divert water from each of said rivers, which water, except for such diversion and permanent taking away, as planned by the Commonwealth of Massachusetts, would naturally flow into the Connecticut River and affect the navigable capacity of said Connecticut River.

10. All of the evidence and information obtained by the Chief of Engineers and the Secretary of War showed that the waters of the Ware River and the Swift River naturally and in the regular course of nature flowed into the Connecticut River, which is a navigable river and the waters of the Ware River and the Swift River so flowing into a navigable river as aforesaid was and is navigable water of the United States and

contributes to the navigable capacity of the said Connecticut River and Congress has not consented to the building of a dam, canal or obstruction in said navigable water of either the Ware River or the Swift River and no plans for the structure have been submitted to the Chief of Engineers or the Secretary of War for approval.

11. All of the evidence and information obtained by the Secretary of War and the Chief of Engineers showed conclusively that no plans had been recommended by the Chief of Engineers or authorized by the Secretary of War for the placing of an obstruction to the navigable capacity of the Connecticut River by interfering with the flow of the tributaries of the Connecticut River, to wit, the Ware River and the Swift River, and all of the evidence and information obtained by or presented to the Secretary of War or the Chief of Engineers showed conclusively that the work contemplated by the Commonwealth of Massachusetts and its servants and agents in diverting and entirely taking away waters of the Ware River and the Swift River from the Connecticut River and the watershed of the Connecticut River and removing and transporting said waters entirely out of said watershed and into another watershed to be used for domestic purposes has no real or substantial relation to the control of navigation and has no appropriateness to that end, and the diversion is contemplated for sanitation and development purposes only, and to permit such diversion or acquiesce therein is outside the power or authority confided by Congress to the Secretary of War.

12. Notwithstanding that the plain and uncontroverted facts all show this diversion to be affectual removal and taking of water which in its usual and natural course flows into a navigable stream and affects and influences the navigable capac-

ity of said stream, if permitted would remove said navigable water entirely from navigation in such a manner as to effectually prevent it from ever again being used in navigation or becoming navigable water or aiding and assisting or developing or affecting the navigable capacity of said Connecticut River and that the duty of the Secretary of War and the Chief of Engineers in the premises was to exercise the functions and power confided by Congress to prevent injury to the navigability of the Connecticut River or to the navigable capacity of said river or to prevent the obstruction or taking away, diverting or removing navigable waters from its use in navigation, the Secretary of War and the Chief of Engineers caused to be entered upon the recommendations in the office of the Secretary of War and the Chief of Engineers the following endorsements:

"7510 (Mass. Dist. Water
Supply Comn.)-1

Subject — Application for permission to divert water from Ware River, Massachusetts.

6th Ind.

Office C. of E. March 6, 1928. TO THE SECRETARY OF WAR:

1. The Metropolitan District Water Supply Commission of the State of Massachusets has made application for permits to divert excess waters from Ware River and the major part of the flow of the Swift River for an additional water supply for the Boston Metropolitan District. The particular application under consideration in this endorsement refers to the excess waters of the Ware River.

* * * * *

9. The applicant is very desirous of a decision concerning the Ware River application as soon as possible. So far as the interests committed to this department are concerned, I see no reason for deferring action in the case. In my opinion the proposed diversion of waters in excess of 85,000,000 gallons per day (131 cubic feet) will have no adverse affect on the Navigable Capacity of the Connecticut River. In view of the controversy before the Supreme Court, it seems inadvisable to issue a formal permit for the present, but to inform the applicant that no objection will be interposed by the War Department to the diversion of the flood waters exceeding 85,000,000 gallons per day for the period October 16th to June 15th of each year. Approval of this course of action is recommended.

(Sgd.) Edgar Jadwin,
Major-General
Chief of Engineers.

Approved March 14, 1928, with the understanding this present action will not affect the consideration of the Swift River application.

(Sgd.) Dwight F. Davis,
Secretary of War.

And thereafter a communication, of which the following is a copy, was submitted to and received by the Metropolitan District Water Supply Commission:

War Department
United States Engineer Office
Providence, R. I.

Refer to file No. Comm. 64/1-104 March 19, 1928.

Metropolitan District Water Supply Commission,
The Commonwealth of Massachusetts
24 School Street
Boston, Massachusetts

Gentlemen:

Referring to your application of November 30, 1927, for federal authority for the diversion of the flood waters of the Ware River for an additional water supply for the Boston Metropolitan District, this office has been directed by the Chief of Engineers to inform you that no objection will be interposed by the War Department to the diversion of the flood waters of the Ware River exceeding 85,000,000 gallons per day for the period October 16 to June 15 each year.

For and in the absence of Colonel S. A. Cheney, Corps of Engineers, District Engineer.

Very respectfully,
Thos. R. McElroe (Sgd.)
Chief Clerk.

The action taken by Chief of Engineers and Secretary of War in the case of the application for a permit to divert waters of the Ware River was claimed by them to be based solely upon the provisions of section 10 of the Rivers and Harbors act approved March 3rd, 1899. Under said section there was no power or authority in either the Chief of Engineers or Secretary of War to take the action herein set forth upon said

application, their authority being expressly confined, under said section, to a recommendation of proposed work for the Chief of Engineers and the authorization of such work by the Secretary of War.

14. Said Metropolitan District Water Supply Commission acting for and in behalf of the Commonwealth of Massachusetts consider said action by the Chief of Engineers and the Secretary of War as an authorization for the diversion of the water of the Ware River as requested in their application dated November 30, 1927, and acting under said authority of the Chief of Engineers and Secretary of War said Metropolitan District Water Supply Commission acting on behalf of the Commonwealth of Massachusetts has entered into a number of contracts amounting to many thousands of dollars for the construction of tunnels and aqueducts, all of which are a part of the general plan of the Commonwealth of Massachusetts to provide for the diversion of the waters of the Ware and Swift Rivers, all of which facts were known to the Chief of Engineers and the Secretary of War and were presented to said officers as a reason why action by the Chief of Engineers and Secretary of War was desired by the Commonwealth of Massachusetts.

15. Whereas, under the law, the facts having showed that this contemplated diversion was not in aid of navigation and was not intended for the protection or improvement of navigation, but in so far as it had any effect on navigation it tended to destroy and create obstructions to the navigable capacity of the Connecticut River and that this work was the creation of obstructions to navigable capacity erected or constructed in navigable waters of the United States, which was prohibited unless affirmatively authorized by Congress, as ap-

pears by Sections 9 and 10 of the Rivers and Harbors Act approved March 3, 1899 (a copy of which is attached and marked Exhibit "C"), the Secretary of War and the Chief of Engineers by their action and the action of their subordinates under their direction and control are encouraging and abetting the Commonwealth of Massachusetts and the Metropolitan District Water Supply Commission as the servants and agents of the Commonwealth of Massachusetts to proceed with the proposed construction in navigable waters in violation of the acts of Congress in such case made and provided and to erect and construct obstructions to the navigable capacity of the waters of the United States to wit: The Connecticut River, and to divert waters from their natural and usual course and into another and entirely different watershed and thereby take navigable water away from and out of a navigable river, affecting the navigable capacity of said Connecticut River, and the Secretary of War and the Chief of Engineers went beyond performance of any duty imposed upon them by the act of Congress and there is no warrant in law and no authority given to the Secretary of War or the Chief of Engineers to send or cause to be sent a communication such as is hereinbefore recited.

16. All of the evidence introduced and all of the facts ascertained by the Secretary of War and the Chief of Engineers showed conclusively that the contemplated construction was an obstruction to the navigable capacity of the Connecticut River, which is directly prohibited and forbidden by the Acts of Congress and the Secretary of War and the Chief of Engineers have no power or authority to recommend or approve the removal or taking of navigable water from its natural watershed and permitting said water to be conveyed away and into another and entirely different watershed to be used for

purpose other than navigation; and it is the duty of the Chief of Engineers and the Secretary of War to disapprove any and all plans for such taking and removal and to exercise due diligence to prevent such taking and removing. All of which said Secretary of War and the said Chief of Engineers have neglected and refused to do and on the contrary, by their unwarranted and unprecedented procedure in sending a letter, signed by the Chief Clerk, have attempted a round-about approval of said taking and diversion by stating the Department had "no objection".

17. All of the evidence submitted to and investigations conducted by the Secretary of War and the Chief of Engineers show conclusively that the navigable capacity of the Connecticut River can be materially increased by storing and holding back flood waters to be later released and in this manner maintain a continuous and regular flow in the Connecticut River, which flow will be of such depth as to materially aid navigation on said river and various governmental agencies have considered plans for the enlargement of the navigable capacity of said Connecticut River, and the action of the Secretary of War and the Chief of Engineers in permitting or condoning the submitting of a letter from the Chief Clerk connected with the War Department, stating that "no objection" will be interposed to the taking and carrying away of a large quantity of water which ordinarily would aid and enlarge the navigable capacity of the Connecticut River is contrary to law and unwarranted.

18. All of the evidence submitted to and investigation conducted by the Secretary of War has shown conclusively that there is no record or knowledge on the part of any persons of the Ware River ever having overflowed the natural banks of the stream and furthermore waters of the said Ware

River flow continuously into the Connecticut River and, as such tributary of the Connecticut River, is navigable water. The Secretary of War and the Chief of Engineers are without any reasonable basis or fact for either assuming or stating that there is "flood water", so-called, which can be diverted.

19. All of the evidence submitted to and investigation conducted by the Chief of Engineers and the Secretary of War shows that the promotion of navigation and the safeguarding of the navigable capacity of the Connecticut River will require the reinforcement of the flow of the stream during the dry season and it is the duty of the Secretary of War to prevent the taking or removal of any water from the watershed of the Connecticut River when it is the common and accepted knowledge of all parties interested that the use of said water in the Connecticut River will aid navigation and preserve the navigable capacity of said Connecticut River.

20. Prior to the adoption of the Constitution of the United States both the State of Connecticut and the Commonwealth of Massachusetts were possessed of a prerogative title to the bed and banks of the Connecticut River and all other navigable streams within their territorial limits. This title carried with it, as incident thereto, a prerogative right in the use of all the water flowing in such navigable streams for public purposes which include navigation and fishing. There was no proprietary interest or title in either of these two states, such title being in the riparian owners along said navigable stream and said proprietary title of the riparian owners carrying with them the use of the waters of the stream for all purposes other than, and only subject to, the right of navigation and fishing in navigable streams by the general public.

21. This title held by the State of Connecticut and the

Commonwealth of Massachusetts vested in these sovereignties a title in trust for all the people of these two states to use all of the water which flowed in its navigable streams for navigation purposes and each of said states was legally bound as trustee to protect and preserve all of the water in these streams for the purposes of navigation to its fullest extent by all of the people of said states.

22. Each of said states also possessed the power and authority to regulate and control all interstate commerce and foreign commerce, having occasion to use the waters of its navigable streams. This power and authority was the only power which was delegated by the State of Connecticut and the Commonwealth of Massachusetts to the United States when its Constitution was adopted.

23. Under this delegation of authority the United States succeeded to the trusteeship in the use of all waters flowing in navigable streams of these states, which were susceptible of being used for the purposes of interstate and foreign commerce. No title was passed to the United States of either the bed or banks of these navigable streams and the only power which was delegated to the United States was the use of these waters in trust for the general public for the purpose of aiding interstate and foreign commerce, maintaining navigation as afforded by nature, and improving navigation by such possible means as from time to time became feasible to insure the maximum use of such waters for commercial purposes.

24. In assuming such trusteeship, the United States as well as the State of Connecticut and the Commonwealth of Massachusetts were charged by all the rules of law, equity and conscience to protect and preserve the trust estate and insure the use of such trust property only for the benefit of the benefi-

ciaries of the trust and only for the purpose for which the trust was created.

25. As such trustee, the United States has no power to authorize or permit the use of any of the navigable waters of the United States or any waters which find their way to and become a part of a commercial waterway of the United States, to be diverted from such navigable stream and taken away from the watershed of such navigable stream and used for a purpose which is neither an aid to navigation nor in any way connected with a navigable purpose.

26. The United States, as such trustee, is charged with the duty of preserving and protecting all of the waters which contribute to the navigable capacity of a navigable stream and when it appears to said trustee that it is proposed to divert any of said water to a point without the watershed of such navigable streams and for a purpose not connected with navigation or when it finds that any such action is threatened, it is the duty of the United States, through its officers and servants, to prevent such diversion and to take all possible measures necessary to prevent the depletion of the trust estate.

27. It is the further duty of the United States, as such trustee, to protect the proprietary rights of riparian owners along the navigable streams by preserving for their use all of the waters flowing into navigable streams so long as their use does not interfere with the navigability or navigable capacity of such streams.

28. The United States has placed in the hands of the Secretary of War and the Chief of Engineers the administrative duty of executing the trust imposed upon the United States to preserve and protect navigation so far as its needs for interstate and foreign commerce are concerned and to prevent the interference with the use of such waters by the states in intra-

state navigation and the use of such waters by the riparian owners in their use of such waters subject only to the interest and needs of interstate and foreign commerce.

29. As hereinbefore alleged, it has not only come to the attention of those administrative officers that the waters of a navigable stream, the Connecticut River, were proposed to be diverted from the watershed of the Connecticut River into an entirely different watershed; that it is proposed to use such waters for no navigable purpose nor for any purpose connected with navigation; but said officers have been directly asked for a permit to accomplish such purposes, which if permitted or allowed will violate the trust heretofore alleged.

30. It is the duty of said administrative officers to refuse to grant such permit and it is their further duty to notify said applicant that all steps possible will be taken to prevent the impairment of the trust estate and prevent the diversion of any water from the watershed of the Connecticut River to any other watershed for a non-navigable purpose or any purpose not connected in any way with navigation.

31. The Secretary of War and the Chief of Engineers have already, by their action in connection with a diversion of waters from the Ware River, notified the Commonwealth of Massachusetts that, while the United States will not affirmatively permit the impairment of this trust estate and the diversion of these waters for a non-navigable purpose, the United States will make no objection to the impairment of the trust estate and will take no measures to prevent the diversion of these waters.

32. It is the immediate purpose of the Secretary of War and the Chief of Engineers to notify the Commonwealth of Massachusetts that the same procedure will apply in the case of the Swift River, and the trust estate will be further impaired

without objection by the trustee and a diversion of navigable water allowed for a non-navigable purpose.

33. The State of Connecticut presented all of the claims of law, included in this Motion, before the Secretary of War and the Chief of Engineers at the time the application for a diversion of the waters of the Ware River was before them for official action and all of said objections and claims of law have been renewed before them in the pending application for a diversion of the waters of the Swift River — all of such claims were overruled by the Chief of Engineers and the Secretary of War in the Ware River case and will be over-ruled in the Swift River matter unless the intervention of this Court is permitted to restrain them from further action. The State of Connecticut has requested the Chief of Engineers and Secretary of War to reconsider and reopen the ruling heretofore made upon the application for the diversion of waters from the Ware River and to deny said application and said request has been rejected.

34. The State of Connecticut, as the owner of the bed and banks to high-water mark of the Connecticut River and as trustee for the people of Connecticut to maintain and preserve all of the water flowing into said navigable stream for navigation purposes and the improvement of navigation to the extent of the navigable capacity of the stream and watershed, is chargeable with the duty of maintaining the navigable capacity of the Connecticut River intact and in the performance of that duty, now requests that action by the Secretary of War and the Chief of Engineers as the administrators of the trust delegated to the United States be prevented from taking any action which in any manner encourages, permits or allows the diversion of any of the waters of the Connecticut River watershed

for non-navigable purposes and to further prevent them from notifying the Commonwealth of Massachusetts that they will not object to nor take any action to prevent the diversion taking place.

35. The State of Connecticut, under its Constitution, being charged with the obligation of enforcing and protecting the proprietary vested rights of the riparian owners along the Connecticut River in their use of the water for all purposes, subject only to rights of navigation, is also charged with the duty of preventing the agents and servants of the United States from permitting or allowing, directly or indirectly, a diversion of any of the waters of the Connecticut River watershed for any purpose other than as an aid to and improvement of navigation.

In consideration whereof, and for as much as your orator and its citizens and residents who except by representation by your orator have no remedy and can only have adequate relief in this honorable court, your orator on its own behalf and also as parens patriae, trustee, guardian and representative of that great proportion of its citizens, who are directly affected by the acts of the defendant hereinbefore set forth, prays this honorable court to take cognizance of the general charges set forth in the premises.

WHEREAS you orator needing relief prays:

1. That the said, the Secretary of War and the Chief of Engineers, their servants and agents and each and every of them may be made parties respondent to the bill of complaint, as filed in this action and that they and each of them may be compelled to answer each and every allegation therein contained and contained in this Motion, but not under oath, the answer under oath being expressly waived.

2. That it be adjudged and decreed that neither your orator nor any of its citizens and residents have an adequate remedy at law for the injury which will result from the enforcement of said acts and that such injury would be irreparable.

3. That the said, the Secretary of War and the Chief of Engineers, their officers, agents and servants and each of them may be restrained from committing any of the acts and deeds herein complained of and from any violation of the rights of your orator or of its citizens and residents in the premises by a writ of injunction, issuing out of and under the seal of this honorable court, perpetually enjoining and restraining the said respondents, their respective officers, agents and servants from in any way interfering with the natural and customary flow of the waters of the Connecticut River or of any tributaries thereof and particularly from allowing and permitting, directly or indirectly, the diversion of any of the waters of said Connecticut River or of any of its tributaries, including the Ware River and the Swift River and from notifying the commonwealth of Massachusetts or any of its servants or agents that the United States, the War Department, the Secretary of War and the Chief of Engineers or any of their servants or agents, will interpose no objection to any proposed diversion of any of said waters, or that a diversion of said waters will not be prevented by the United States, the Secretary of War, the Chief of Engineers or any of their servants or agents, or taking any action upon the application for the diversion of the Swift River except to deny the same, and by way of affirmative relief that the Secretary of War, the Chief of Engineers, their officers, servants and agents be ordered to revoke and withdraw the recommendation and approval upon the application to divert the waters of the Ware River and to deny said application.

4. That this honorable court may grant your orator such other and further relief as the equity of the case may require whether specifically prayed for herein or not, and which to your honorable court may seem just and proper in the premises.

5. That it may please your honorable court to grant unto your orator not only a writ or injunction conformable to the prayers of this bill, but also that a writ of subpoena of the United States of America be issued out of and under the seal of this court directed to the Secretary of War, the Chief of Engineers of the U. S. Army, their officers, servants and agents, commanding said respondents on a certain day to be named therein, to be and appear before this honorable court then and there to answer, but not under oath, answer under oath being waived, all and singular the premises, and to stand to, perform, and abide such order, direction and decree as may be against said respondents in the premises and as may be required by the principles of law, equity and good conscience.

THE STATE OF CONNECTICUT,

By Benjamin W. Alling,

Its Attorney General.

And your orator will ever pray.

Ernest L. Averill,

Deputy Attorney General

Benedict M. Holden,

of Counsel.

EXHIBIT "A"

Acts of 1926, Chapter 375.

AN ACT MAKING ADDITIONAL PROVISION FOR THE WATER SUPPLY NEEDS OF THE METROPOLITAN WATER DISTRICT AND OTHER COMMUNITIES WHICH NOW OR HEREAFTER MAY REQUIRE WATER THEREFROM, AND OF THE CITY OF WORCESTER.

Whereas, The deferred operation of this act would, in part, defeat its purpose, therefore it is hereby declared to be an emergency law necessary for the immediate preservation of the public convenience.

Be it enacted, etc., as follows:

Section 1. A special metropolitan district water supply commission is hereby established, consisting of the commissioner of the metropolitan district commission as chairman and of two associate commissioners to be appointed by the governor with the advice and consent of the council, said commission to be hereinafter referred to as the commission. The associate commissioners shall serve for terms of five years, or until their successors are appointed and qualified. The governor may with like advice and consent remove any associate commissioner and fill for any unexpired term vacancies which may occur in the associate commissionerships. The chairman shall receive in addition to his salary as commissioner of the metropolitan district commission the sum of twenty-five hundred dollars a year, and the associate commissioners shall each

receive a salary of four thousand dollars a year. The commission may hire such offices and other quarters as may be needed for the conduct of its work. The commission may appoint a chief engineer, and with the advice and consent of the governor and council may fix his salary.

The commission, on behalf of the commonwealth, shall forthwith for the purpose of extending and increasing the water supply of the metropolitan water system, and of such cities and towns not members of the metropolitan water district as may hereafter require water from said system, divert into the Wachusett reservoir of said district the flood waters, as defined in section four, of the Ware river at a point in the town of Oakham or the town of Barre not more than one mile from the bridge of the Boston and Albany railroad crossing said river in the village of Coldbrook, and construct as a part of the metropolitan water system, such works as may be necessary for such extension and increase, and ill structures and appurtenances incidental or complementary thereto; provided, that said flood waters shall not be so diverted between May thirty-first and December first in any year unless such diversion be first approved by the state department of public health. Said works, and particularly the aqueduct or tunnel required for said diversion, shall be constructed at such grade and of such capacity and otherwise so that they can be used as a part of works that shall later be constructed for diverting into the Wachusett reservoir the waters of the Swift river, in substantial accordance with the plans and recommendations of the joint board on water supply needs and resources of the commonwealth as contained in its report to the general court in the year nineteen hundred and twenty-two, printed as house document number fifteen hundred and fifty of said year. All plans, maps and records of said joint board relating to the proposed extension to

the Ware, Swift and Millers rivers shall be made available to the commission, and the department of public health shall, at the expense of the commission, furnish it, on request, with any information relative to said projects that said department may have in its possession. In constructing the works herein authorized, the commission may adopt such emergency methods as in its opinion may be necessary or desirable to secure their completion as soon as the public necessity may require.

Said aqueduct or tunnel upon completion to said point of diversion and the diverting dam and other works and property incidental thereto, when completed shall be turned over to the metropolitan district commission, and shall be thereafter maintained by said commission as a part of the metropolitan water system under chapter ninety-two of the General Laws with all the powers and duties conferred by said chapter.

The commission established hereby shall annually, on or before January fifteenth, make a report, in conformity with the provisions of section thirty-two of chapter thirty of the General Laws, for the fiscal year ending on the thirtieth of November preceding, and said report shall be printed as a public document under section six of chapter five of the General Laws.

Sec. 2. In contracts entered into by the commission for the construction of the works herein authorized, there may be inserted a provision that the commission or any contractor or sub-contractor for the commission may employ laborers, workmen and mechanics for more than eight hours in any one day and for more than forty-eight hours in any one week in such construction, when, in the opinion of the commissioner of labor and industries, public necessity so requires. The commission may appoint and in its discretion remove such engineering, legal, clerical and other assistants as it may deem necessary to

carry on the work herein authorized, and may fix their compensation in accordance with such rules and regulations as the commission may establish and as shall be aproved by the governor and council. Such appointments shall not be subject to classification under sections forty-five to fifty, inclusive, of chapter thirty of the General Laws, and chapter thirty-one of the General Laws shall not apply to removals, and, in accordance with such regulations as the commission may establish and as shall be approved by the governor and council, any appointment, including that of the chief engineer, may be wholly exempt from said chapter thirty-one. Upon request of the commission, the division of civil service shall hold special examinations.

Sec. 3. For the purpose of providing for the future extension of the metropolitan water system, the commission, on behalf of the commonwealth, may take by purchase or otherwise such lands, water rights, easements and other property in the watershed of the Swift river as it may deem necessary or desirable in preparation for the development of this river as a potential water supply for future use. The commission shall submit to the general court not later than the first Wednesday of January, nineten hundred and twenty-seven, a draft of such legislation as it may deem necessary or advisable for the development of an adequate future water supply from the Swift river.

The commission shall also consider the recommendations of the metropolitan district commission relative to making available by filtration or chlorination, or both, the waters of the Sudbury and Cochituate watersheds as contained in house document number eleven hundred and ten of nineteen hundred and twenty-six and as referred to in the report of the metropolitan water supply investigating commission in house docu-

ment number nine hundred of nineteen hundred and twenty-six; shall consider the effect on the present water supply of the metropolitan district of the addition thereto of water purified by filtration or other means and the effect of such water upon the present aqueducts, reservoirs and other facilities of the metropolitan water district; and shall report in detail plans and specifications for such land takings and for the construction of such additional works in the town of Framingham, and of such covered reservoirs as it may recommend, and the estimated expense thereof. The commission shall also consider and report on the amount of water which should be required for reasons of health and sanitation to flow below dam number one on the Sudbury river notwithstanding any provision of chapter one hundred and seventy-seven of the acts of eighteen hundred and seventy-two, and on all matters set forth in house document number ten hundred and forty-eight of nineteen hundred and twenty-six and the petition accompanying the same, especially the present and future water supply needs and resources of the town of Framingham, and the terms and conditions upon which said town should be entitled to receive water from the water supply now owned by the metropolitan district. The commission shall also consider and report upon the effect of the diversion for water supply purposes of the waters of the South Sudbury river upon public health in the town of Ashland, and whether or not a system of sewage disposal should be provided in said town in the event of such diversion. The commission shall report to the general court its findings and recommendations relative to the questions outlined in this paragraph, together with drafts of such legislation as may be necessary to effect its recommendations, by filing the same with the clerk of the house of representatives not later than December first of the current year, and it shall

at the same time file a copy thereof with the budget commissioner.

Sec. 4. For the purposes of this act, the flood waters of the said Ware river which the commission is authorized to divert as provided in section one are hereby defined to be the waters thereof at and above the point of diversion established under section one in excess of a flow of eighty-five million gallons a day, meaning thereby that on any day when the natural flow of said river is less than eighty-five million gallons no water shall be diverted.

The commission shall establish and maintain proper gauging stations or such suitable regulating devices as may be convenient and practical to establish the aforesaid limit of diversion with reasonable accuracy. Copies of all records obtained at such stations or by such devices shall be open to inspection during reasonable office hours and information shall be furnished, from time to time whenever reasonably requested, to any person owning or operating any mill or manufacturing establishment below the point of diversion or taking, or to the mayor of any city or the chairman of the board of selectmen of any town bordering on said river.

The waters of said Ware river and its tributaries at or above the point of diversion established as aforesaid, other than those authorized to be taken by the provisions of this act, and other than those waters not so taken which are needed for the processes of industry or for reasons of public health, are within its contemplation to be, when and as hereafter authorized by the general court, available for the domestic and public water supply of the city of Worcester and of the towns within the watershed of said river and its tributaries.

Sec. 5. For any of the purposes of this act, the commission, on behalf of the commonwealth, may at any time and

from time to time take by eminent domain or acquire by purchase or otherwise the flood waters, as hereinbefore defined, of the Ware river and its tributaries, or any of said flood waters, at or above the point of diversion established under section one, and all water rights, water sources, lands, rights of way, easements and other interests in land, including any cemetery, that may be deemed by the commission to be necessary or desirable for any of said purposes, or for the further protection of the purity of the waters to be diverted under this act.

Any taking under this act may be in fee or otherwise, perpetual in duration or for a limited period of time, according as the commission shall determine and set forth in the order of taking.

All takings under this act and all proceedings in relation to or growing out of the same shall conform to the provisions of chapter seventy-nine of the General Laws, except in the following particulars:

(*a*) The commission need make no award of damages sustained by persons or corporations in their property by any such taking.

(*b*) The notice required by section eight of said chapter may be given at any time within one year after the recording of the order of taking as provided in section three of said chapter.

(*c*) Petitions for the assessment of damages under section fourteen of said chapter may be filed within two years after the recording of the order of taking provided for in said section three, but petitions for the assessment of damages for the taking of rights of diversion may be filed within two years after, and not before, the actual diversion. The last six lines of section sixteen of said chapter seventy-nine, beginning with the word

"but" in line three, shall have no application to takings under this act.

(*d*) For all property taken under this act, except rights of diversion, the right to damages shall vest upon the recording of the taking in the registry of deeds. For taking of rights of diversion the right to damages shall vest upon and not before the actual diversion of water.

The owner of any real estate, whether within or without the commonwealth, which is not taken but is injured by the taking of the waters of Ware river under authority of this act or by the construction of the works incidental thereto shall be entitled to damages therefor and may recover the same from the commonwealth as in the case of a taking in accordance with the provisions of this act.

Sec. 6. In carrying out the powers and duties conferred upon it by this act, the commission may construct and maintain buildings, machinery, roads, conduits and aqueducts; may lay and maintain pipes, drains and wires; may alter or change the grades or directions of any water course; may carry and conduct any aqueduct, conduit, pipe, drain or wire under or over any water course, or any railroad, street or other way, in such a manner as not unnecessarily to obstruct or impede travel thereon; may dig up any such road, street or way, and lay, maintain and repair aqueducts, conduits, pipes, wires and other works beneath the surface thereof, conforming to any reasonable regulations made by the mayor and aldermen of cities and the selectmen of towns, respectively, wherein such works are performed, and restoring, so far as practicable, any such road, street or way to as good order and condition as the same was in when such digging was commenced; the commission may enter upon and use the lands of others; may take down dams to such an extent as it may deem necessary for

prosecuting its works, and shall rebuild such dams whenever the necessity for keeping them down ceases; shall use such lands and do all work relating to such dams, in a reasonable manner with regard to the interests of the owners thereof, and, so far as practicable, shall heed all reasonable requests made by such owners; and in general may do any other act or thing necessary or proper for carrying out the powers and duties conferred upon it by this act.

The commission may raise or alter or discontinue parts of any railroad or public way, and, in case of a railroad, shall make such raisings or alterations of the railroad or construct upon existing or other locations parts of the railroad to take the place of the parts so discontinued, as and in such manner as shall be mutually agreed upon by the commission and the board of directors of the railroad company, and, if they cannot agree thereon, then as and in such manner as shall be determined on the application of either party in writing by the department of public utilities, which is hereby authorized and directed to adjudicate finally upon the same; and, if the commission shall be of the opinion that the making of any such change of grade, alteration or construction requires that lands or rights therein be taken therefor, the commission shall, on behalf of the commonwealth, take such lands or rights therein and convey the same to the railroad company, to be thereafter held and used as the board of directors of such company may determine, and the railroad company may, if it desires, locate its lines over any lands or rights therein so conveyed to it, and, when said new lines of railroad are completed, the railroad company may discontinue the operation of the portions of its existing lines for which the new lines are substituted, and may maintain and operate said new lines of railroad; and the commission shall make the raisings or alterations of public ways as aforesaid and

build in place of the parts of public ways discontinued as aforesaid such other reasonable and suitable ways, which shall thereafter be highways, as and in such manner as shall be mutually agreed upon by the commission and the county commissioners of the county in which the work is done, or, if they cannot agree thereon, then as and in such manner as shall be determined on the application of the commission in writing by the division of highways of the department of public works, which division is hereby authorized and direct to adjudicate finally upon the same.

The commission, in flooding or otherwise affecting any burial ground, shall conform to any reasonable requirements relating thereto of the board of health of the city or town in which the same is located.

The commission may make such surveys, borings and do such other preliminary work on private lands as the commission may determine to be necessary or desirable, doing as little damage as possible and paying for the same.

Sec. 7. The commission may sell at public or private sale, or exchange or lease any property, real or personal, or any easement or water right, whether taken by eminent domain or otherwise acquired, which in the opinion of the commission is no longer needed for the purposes of this act. Any sums of money so received shall be applied to reduce construction costs or to reduce the bonded indebtedness for the works. The commission may, by lease, license or contract, permit the construction and maintenance on or over any land or waters under its control of towers, poles, wires and other structures for the purpose of transmitting electric power. The commission may construct, maintain and operate such power plants and other structures as may in its opinion be necessary to utilize the fall of water created at any of the dams, channels, tunnels or other structures

under its control, for the production of power or electricity; may locate, construct and maintain lines for transmitting the same; and may sell or contract for the sale or use of any power or electricity so created, and any sums of money so received shall be applied to reduce the charges of maintenance of said works.

Sec. 8. For the purpose of carrying out the provisions of this act, the commission may expend such amounts, not exceeding in the aggregate fifteen million dollars, including the sum required to be paid by the city of Worcester under section twelve, as may, from time to time, be approved by the governor and council. To meet such expenditures, the state treasurer shall, from time to time, on the request of the commission and subject to such approval, issue bonds of the commonwealth to an amount not exceeding the sum of fourteen million dollars, which shall be designated on their face, Metropolitan Additional Water Loan, Act of 1926. Such bonds shall be issued as coupon or registered bonds, for such term of years as may be recommended by the governor, in accordance with section three of Article LXII of the amendments to the constitution, and shall bear interest at such rate as shall be fixed by the state treasurer, with the approval of the governor and council. The amounts necessary to meet interest and serial payment requirements on said bonds and the expenses of maintaining and operating the works to be constructed by the commission under this act, and such other expenses as may be authorized hereunder, shall be added to the annual assessments upon the cities and towns comprising the metropolitan water district and apportioned and collected as provided by section twenty-six of chapter ninety-two of the General Laws.

Sec. 9. The supreme judicial court or any justice thereof and the superior court or any justice thereof, during a sitting

of the court or in vacation, on the petition of the commission or of any city, town, corporation or person interested, or of the attorney of any such petitioner, shall have jurisdiction in equity or otherwise to enforce the provisions of this act and of any rule, regulation or order made under the authority of the same and to prevent any violation of said provisions, rules, regulations or orders; provided, however, that no suit in which the right of the commission to make any taking authorized by this act is questioned shall be brought except in the supreme judicial court for the county in which said taking has been made or is to be made, nor unless the said suit is brought within six months after the passage of this act.

Sec. 10. No person shall after the effective date of this act erect a dam for mill purposes across the Ware river or any of its tributaries above the point of diversion authorized by this act without the consent in writing of the commission, or, after said works have been turned over to the metropolitan district commission, of said metropolitan district commission. In granting its consent, either commission may impose such conditions as it may deem to be for the public interest. Any person owning a practicable mill site on said river or any of its tributaries who applies for such consent and is refused, or is granted consent subject to conditions, and who is damaged in his property by such refusal or by the imposition of such conditions, may recover from the commonwealth the damage so caused in the manner provided in section five.

Sec. 11. The towns of Hubbardston, Barre, Oakham, Hardwick, New Braintree, Palmer and Ware, or any of them, may take from the Ware river above the point of diversion established under section one so much of the water thereof as they, or any of them, have already been, or may hereafter be, authorized by the legislature to take for supplying their in-

habitants with water, and in case any of said towns shall hereafter on its application therefor be authorized to take such water it shall pay to the commonwealth, on behalf of the metropolitan district, a fair proportion of the cost incurred by the commonwealth for the acquisition under the provisions of this act of the waters of said river, or rights therein, and for the construction, maintenance and operation of such works and structures as are by this act provided for, including a fair proportion of the cost of maintaining the purity of said water, the said proportion to be determined by an engineer designated by the metropolitan district commission and by an engineer appointed by such applicant town, and, if they cannot agree, such proportion shall be determined by a master to be appointed by the supreme judicial court on the petition of the commonwealth or said applicant town, and the report of the master when affirmed by said court shall be final and conclusive on all parties.

Sec. 12. The city of Worcester is hereby authorized, for the purpose of meeting the requirements of said city for increasing its water supply and such requirements of adjacent and nearby towns now supplied or hereafter required to be supplied by said city, from time to time, to acquire by purchase or otherwise, or take by eminent domain in accordance with the procedure set forth in section five, and subject to the provisions thereof, and to hold and convey, directly or indirectly, into and through said city the waters of South Wachusett brook, so-called, and the waters of Quinapoxet river, so-called, in the the town of Holden, at or near an elevation of seven hundred and eight feet above mean sea level at Boston, at or above the outlet of Quinapoxet pond, including the waters in any ponds or reservoirs thereon and the waters flowing directly or indirectly into and from the same, and all springs

and tributaries thereto, and the water rights connected with the aforesaid waters and sources above the places of taking; and the said city may take existing reservoirs and ponds upon said streams and their tributaries above the points at which it is authorized as aforesaid to take the said waters, but the total supply herein authorized to be taken shall not exceed in any calendar year an average quantity of ten million gallons of water per diem, and the balance of the waters remaining, and also from time to time such part of the quantity of water herein authorized to be acquired and diverted as is not, in the opinion of the water commissioner of said city, needed for the supply of the water system of said city, shall be permitted to flow to the Wachusett reservoir of the metropolitan water system; provided, that if in the opinion of the metropolitan district commission, the needs of the metropolitan water system, pending the completion of the works necessary to divert the flood waters of the Ware river as authorized in section one, require that said amount herein authorized to be taken by the said city be reduced, the metropolitan district commission may, at any time and from time to time, reduce said amount to not less than an average quantity of five million gallons of water per diem. In case of such reduction the commonwealth on behalf of the metropolitan district shall pay the city of Worcester for the amount of water so withheld by such reduction at the rate of forty dollars per million gallons. The said city shall take such measures to protect and preserve the purity of the said waters and shall maintain such sanitary conditions relative thereto and in their respective watersheds as the state department of public health may require. Said city may by aqueduct or pipe line conduct the waters so taken into the city directly or through any reservoir and any aqueduct or pipe line belonging to said city and now existing. The said city may,

for the purposes aforesaid, construct, lay and maintain conduits, pipes, canals, water courses, dams, reservoirs and other works under or over lands, water courses, railroads, railways, public or private ways and along such ways, and may take by purchase or otherwise and hold in fee or otherwise any lands, dams or structures, easements or rights in land that may be deemed necessary for said purposes and for collecting, purifying, storing, discharging, conducting or distributing said waters or preserving the purity thereof. The water taken by said city under this section shall be measured in a manner approved by the metropolitan district commission which shall have at all reasonable times free access to any apparatus or device used for measuring the same and to the records thereof.

In addition to such payments and damages as said city may be required to make for any purchases or takings hereinbefore authorized, it shall pay into the state treasury on or before the first day of July, nineteen hundred and twenty-seven, the sum of one million dollars, and thereupon the metropolitan district commission, acting for the commonwealth, shall release and convey to said city all right and title to said waters, subject to the provisions of this act. The amount so paid into the state treasury shall be used toward defraying construction costs incurred by the commission under this act.

In consideration of the provisions of this section, it is within the contemplation of this act that no further claim be made by the city of Worcester to any further part of the watershed tributary to the Wachusett reservoir for water supply purposes.

Sec. 13. For the purpose of meeting expenditures required under the preceding section, the city of Worcester may borrow from time to time, within a period of eight years from the effective date of this act, such sums as may be necessary, not exceeding, in the aggregate two million five hundred thou-

sand dollars, and may issue bonds or notes therefor, which shall bear on their face the words, City of Worcester Water Loan, Act of 1926. Each authorized issue shall constitute a separate loan, and such loans shall be payable in not more than thirty years from their dates. Indebtedness incurred under this act shall be in excess of the statutory limit, but shall, except as herein provided, be subject to chapter forty-four of the General Laws.

Sec. 14. The said city shall, at the time of authorizing said loan or bonds, provide for the payment thereof in accordance with section thirteen; and when a vote to that effect has been passed, a sum which, with the income derived from water rates, will be sufficient to pay the annual expense of operating its water works and the interest as it accrues on the bonds or notes issued as aforesaid by the city and to make such payments on the principal as may be required under the provisions of said section thirteen shall, without further vote, be assessed by the assessors of the city annually thereafter in the same manner as other taxes, until the debt incurred by said loan or loans is extinguished.

Approved May 28, 1926.

EXHIBIT "B"

Acts of 1927, Chapter 321.

AN ACT MAKING ADDITIONAL PROVISION FOR THE WATER SUPPLY NEEDS OF THE METROPOLITAN WATER DISTRICT AND FOR COMMUNITIES WHICH NOW OR HEREAFTER MAY REQUIRE WATER THEREFROM, BY THE DEVELOPMENT OF AN ADEQUATE FUTURE WATER SUPPLY FROM THE SWIFT RIVER.

Whereas, The deferred operation of this act would in part defeat its purpose, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

Be it enacted, etc., as follows:

Section 1. The metropolitan district water supply commission, established by chapter three hundred and seventy-five of the acts of nineteen hundred and twenty-six, hereinafter referred to as the commission, on behalf of the commonwealth, shall forthwith, for the purpose of adding to, extending and further developing the additional sources of water supply of the metropolitan water system provided for in said chapter three hundred and seventy-five, divert into the Wachusett reservoir of the metropolitan water system the waters of the Swift river, and of Beaver brook, a tributary of the Ware river, by the construction of an extension to the Swift river of the aqueduct or tunnel between the Wachusett reservoir and the Ware river at or near Coldbrook provided for in said

chapter three hundred and seventy-five, and by the construction of a temporary diversion dam as may be required at a point on the Swift river below the confluence of the east and middle branches or at a point on the east branch near the village of Greenwich, and ultimately by the construction of a dam across the Swift river at or near the boundary line between the towns of Ware and Enfield, and of a dam across Beaver brook at or near said boundary line, thereby creating a storage reservoir in the Swift river valley. No water shall be diverted or stored in any calendar day when the flow of the Swift river at or just above the village of Bondsville in the towns of Palmer and Belchertown is less than twenty million gallons; and there shall be discharged from any storage created by the commission above said village a sufficient amount of water to maintain, so far as such storage will allow, a flow of said river at said village of not less than twenty million gallons in each calendar day.

The commission may also divert into the aqueduct or tunnel between the Wachusett reservoir and the Ware river, provided for in said chapter three hundred and seventy-five, the waters of the Quinapoxet river at a point in the town of Holden about one mile westerly from the boundary line between the towns of Holden and West Boylston. The flow of the Quinapoxet river at said point of diversion shall not be diminished by said diversion to less than one million gallons in each calendar day.

The commission shall establish and maintain proper gauging stations, or such regulating devices as may be convenient and practical, to limit the diversion of the waters of the Swift and Quinapoxet rivers as aforesaid and to establish and maintain the aforesaid flow of the Swift river at or just above Bondsville with reasonable accuracy. Copies of all records for the Swift river obtained at such stations or by such devices

shall be open to inspection during reasonable office hours, and information shall be furnished from time to time, whenever reasonably requested, to any person owning or operating any mill or manufacturing establishment below the dam across the Swift river authorized by this act, or to the mayor of any city or the chairman of the board of selectmen of any town bordering on the Swift or Chicopee rivers.

All or any part of the flood waters of the Ware river, as defined in section four of chapter three hundred and seventy-five of the acts of nineteen hundred and twenty-six, authorized to be diverted at or near Coldbrook by said chapter three hundred and seventy-five, or of the waters of the Quinapoxet river herein authorized to be diverted, may be diverted, at such times as may be necessary or desirable for storage, into the Swift river reservoir pending the ultimate diversion thereof into the Wachusett reservoir.

Sec. 2. The commission may construct as a part of the metropolitan water system such aqueducts, tunnels, dams, reservoirs and other works as in its opinion may be necessary for the additions, extensions and developments authorized by this act and all structures and appurtenances that in the opinion of the commission are desirable as incidental or complementary to such additions, extensions and developments. The commission shall also collect and publish in its reports such information as to the geology of the region in which any of the works which it is authorized to construct may be located as may be of value in connection with the geological history of the state. The works authorized by this act shall be of such dimensions, capacities and areas as the commission may determine, and may from time to time be enlarged or modified as the commission may determine; and may be so constructed, enlarged or

modified as to allow for a future increase in capacity to take care of the diversion of other streams in substantial accordance with the plans and recommendations of the joint board on water supply needs and resources of the commonwealth as contained in its report to the general court in nineteen hundred and twenty-two printed as house document fifteen hundred and fifty of that year; but nothing in this act shall be held to authorize any taking or diversion of any waters of the Millers river watershed or to affirm the intention of taking at any future date any unutilized flood waters of said Millers river.

Except as otherwise in this act provided, all the property acquired and works constructed under this act shall when completed be turned over to the metropolitan district commission, and shall thereafter be maintained and operated by it as a part of the metropolitan water system under chapter ninety-two of the General Laws with all the powers and duties conferred by said chapter.

Sec. 3. In constructing the works authorized by this act the metropolitan district water supply commission shall proceed with the organization and in the manner provided by said chapter three hundred and seventy-five. All of the provisions of section two of said chapter three hundred and seventy-five relative to the employment of laborers, workmen and mechanics and relative to the appointment, removal and fixing of compensation of all employees of the commission, including the appointment and removal of a chief engineer, shall apply in carrying out the provisions of this act. None of the employees of the commission, whether appointed before or after the effective date of this act, shall become members of the state retirement system, but those who are members thereof at the time of their employment may be continued therein.

Sec. 4. For any of the purposes of this act, or for the further protection of the purity of the waters to be diverted under this act, or for the purpose of providing for a future increase in the capacity of the Swift river reservoir, the commission on behalf of the commonwealth may, at any time and from time to time, take by eminent domain or acquire by purchase or otherwise, such lands, waters, water rights, easements and other property or interests in property, including any cemetery, as it may deem necessary or desirable; provided, however, that the amount of water to be let down into the Swift river as provided in section one of this act shall not be diminished by any taking under this act.

The commission shall take or otherwise acquire in fee all lands which will be submerged by the construction of dams and reservoirs under this act.

For any of the purposes of this act, the commission may take and use the waters of any great pond within the watershed of the Swift river, and thereafter any other public use of such great pond and the waters thereof shall cease.

The commission may also take and use, for the purposes of this act or of said chapter three hundred and seventy-five, any land or rights in land of the commonwealth upon such terms and conditions as may be agreed upon by the commission and the state department or other authority which at the time is vested by the commonwealth with the care and control of such lands or rights, and if the commission and such department or other authority cannot agree upon said terms and conditions, then such terms and conditions shall be fixed by the governor and council.

Any taking under this act, except as hereinbefore in this section provided, may be in fee or otherwise perpetual in dura-

tion or for a limited period of time, according as the commission shall determine and set forth in the order of taking.

All takings under this act of property or rights in property and all proceedings in relation to or growing out of such takings shall conform to the provisions of chapter seventy-nine of the General Laws, except in the following particulars:

(*a*) The commission need make no award of damages sustained by persons or corporations in their property by any such taking.

(*b*) The notice required by section eight of said chapter seventy-nine may be given at any time within one year after the recording of the order of taking as provided in section three of said chapter.

(*c*) Petitions for the assessment of damages under section fourteen of said chapter seventy-nine may be filed within two years after the recording of the order of taking provided for in said section three, but petitions for the assessment of damages for the taking of rights of diversion appurtenant to land not taken may be filed within two years after, and not before, the actual diversion. The last six lines of section sixteen of said chapter seventy-nine, beginning with the word "but" in line three, shall have no application to takings under this act.

(*d*) For all property taken under this act except rights of diversion appurtenant to land not taken, the right to damages shall vest upon the recording of the taking in the registry of deeds. For all rights of diversion taken under this act appurtenant to land not taken, the right to damages shall vest upon and not before the actual diversion of water.

At any time after the passage of this act, the commission before or after the actual diversion of water may make such

settlements as it may deem for the best interests of the commonwealth with any person or corporation who may be or has been damaged by any taking of or injury to his water rights under this act and in making any such settlements the commission may, subject to the approval of the governor and council, make a contract, which shall be in a form approved by the attorney general and shall be binding upon the commonwealth and such owner or person and his successors in title, with respect to the amount of the flow down the stream to which such water rights are appurtenant, or to the time and manner of such flow, or may agree to furnish in some other way a substitute for the water rights which have been or may be taken or injured. Such contract, if acknowledged by the owner or commission or any member of it before a justice of the peace or a notary public, may be recorded in the registry of deeds in the county in which the land to which such water rights are appurtenant is situated.

Sec. 5. Any person or corporation owning at the time of the passage of this act any real estate which is not taken or purchased for the reservoir or the protection of the waters thereof under the provisions of this act situated within the territory comprised in the towns of Dana, Enfield, Greenwich and Prescott or within those portions of the towns of Belchertown, Hardwick, Pelham, Petersham, New Salem, Shutesbury and Ware not more than one mile distant from land required to be purchased or taken in fee under the second paragraph of section four of this act which real estate is decreased in value by the carrying out of the provisions of this act, or any person or corporation owning at the time of the passage of this act an established business on land within territory defined in this paragraph, which business is decreased in value, whether by loss of custom or otherwise, by the carrying out of the pro-

visions of this act shall be entitled to recover damages in the manner hereinafter provided in this section. The commission, however, in its discretion, if it finds that any such person or corporation has an established business located near to but outside the areas defined in this paragraph which has been actually decreased in value by the carrying out of the provisions of this act and which person or corporation would have been entitled to damages under this section if located within the areas defined in this paragraph, may make such settlement by agreement with such person or corporation as it may deem just, but only upon the filing of a claim therefor within the time hereinafter provided in this section.

Any resident of the towns of Dana, Enfield, Greenwich, Prescott or New Salem at the date of the passage of this act who had been for the six months next previous thereto regularly employed therein in a manufacturing establishment or in an established business or upon any lands and is not the owner or part owner of any interest in any such business or lands who, by the carrying out of the provisions of this act, is deprived of such employment and obliged to seek other employment or has suffered a diminution in wages shall, if upon reasonable effort he has been unable to secure such employment or to avoid such diminution in wages, be entitled to recover either by agreement with the commission or in the manner hereinafter provided in this section his damages in loss of or diminution in wages, not exceeding, however, the amount of wages received by him for the six months previous to such loss of employment. No person shall have any right of recovery for more than one such loss of employment or one such diminution in wages under the provisions of this paragraph, and no person shall have the right to recover for both injury to an established

business under the provisions of the preceding paragraph and for loss of employment therein.

Any wage earner who at the time of the passage of this act resides in the town of Dana, Enfield, Greenwich, Prescott or New Salem who makes no other claim for damages under this act shall in case he is forced by the carrying out of this act to remove to a locality more than eight miles from land required to be taken in fee under the second paragraph of section four of this act be repaid the actual cost of such removal to an amount not exceeding fifty dollars.

Any person or corporation claiming to be injured as provided in this section, if such person or corporation so elects, may, after November first, nineteen hundred and twenty-eight but not later than six months from the date of the annexation of the towns of Enfield, Greenwich and Prescott, as provided in section thirteen of this act, file with the commission a sworn statement of his claim, setting forth the facts upon which it is based and the amount claimed, and if the commission cannot agree with such claimant upon the amount of such damage, or if the payment agreed to of such claim is not made within six months after such sworn statement is filed, then for determination of his damages, such claimant may within sixty days thereafter file a sworn copy of such statement of claim with the board of referees hereinafter provided. A justice of the supreme judicial court, either in term time or vacation, upon application by the commission or any other party in interest and after publication, or such other notice as the court may order, shall from time to time as the need may exist appoint one or more boards of referees, each consisting of three disinterested persons for the determination of damages, and may, after notice and hearing of any parties interested, fill any vacancy on such boards. The compensation of such referees

shall be fixed by the supreme judicial court in its order of appointment, and the same, together with such expenses as may necessarily be incurred by the said referees, shall if approved by the said court be paid by the commission. The board shall determine its procedure, including all matters relating to the form and place of application subject to the approval of said court. Upon reference of any claim within the provisions of this section, and after notice to the parties and hearing thereon, the board shall determine the amount of damages suffered and shall certify its findings to the commission; which findings shall be conclusive upon all parties except that any party in interest aggrieved by a ruling of the referees on a question of law may object thereto and the supreme judicial court shall have power to review and modify any finding to the extent that it may be an error in that respect, but not otherwise. If any person or corporation has a claim for damage under this section and also a claim for damages to property or rights in property within the provisions of section four of this act, the referees to whom said first named claim is referred under the provisions of this section shall, upon written application by the claimant, with the assent of the commission, have jurisdiction to determine both said claims.

Any person or corporation presenting a claim under this section for decrease in value of any parcel of land or of a business shall have no further claim under this section for damages to such land or business and all existing claims whether for damages to land, business or employment shall be included in one statement.

No right to recover damages or to receive any payment under this section shall be assignable, but any such right shall survive to the heirs at law of the party entitled.

Sec. 6. Prior to the taking under section four of this act of any land or rights in land within the territory described in the first paragraph of section five of this act which will be required for the reservoir or the protection of the waters thereof, the owner of any such land or rights in land may at any time after November first, nineteen hundred and twenty-eight, if he so elects, file with the commission a sworn statement of the location, nature and extent of such land or rights together with such further information as the commission may require, the sum he is willing to accept therefor and a request that such land or rights be acquired. If in the opinion of the commission such land or rights are within the said territory and will be required, it shall with all due diligence make a search of the title and if it deems it necessary a survey, and shall furnish said owner with a statement of any defects in the title as soon thereafter as the owner delivers to the commission a deed and all other instruments necessary to convey to the commonwealth a merchantable title to such land or rights and files a sworn copy of said statement with the board of referees, as provided in section five of this act, he shall have a claim for damages for the value of such land or rights, which value said board shall determine, as provided in said section five, unless a settlement has been previously effected by agreement. The said board shall certify its findings to the commission and the owner, which said findings shall be conclusive upon all parties except as otherwise provided in said section five.

In determining the value of any land acquired under this section within the territory described in the first paragraph of section five of this act, or the damage to any business as provided in the first paragraph of said section five, said board of referees may include in such value of land or damage to business such depreciation of value of land or decrease in

value of business, if any, in addition to any damages which would otherwise accrue, as in the opinion of the said board may have been caused between January first, nineteen hundred and twenty-six, and the date of the passage of this act by reason of proposed legislation resulting in this act.

The board of referees may consider as an element of damage, in determining the value of any land used for farming purposes acquired under this section and owned at the date of the passage of this act by a person whose principal business is farming and who is no longer to continue that occupation in that neighborhood, any difference between the fair value of tools and implements used by him for farming purposes and the value thereof at a forced sale.

Sec. 7. The commission may either before a taking or afterward make such settlements as it may deem for the best interests of the commonwealth with any person or corporation having a valid claim under this act.

Sec. 8. If any public ways are within the area taken in fee by the commission, such portions thereof as the commission shall determine shall, at such time after such taking as the commission shall so notify the public authorities charged with their continuance and maintenance, be discontinued. The commission shall provide, when reasonably practicable, and public necessity or convenience require, other suitable ways in lieu of those discontinued, and may acquire by purchase or otherwise as provided by this act any lands or rights in land needed therefor. The practicability, public necessity and convenience and the location and character of any such new ways shall be determined by agreement between the commission and the county commissioners of the county or counties in which any discontinued way is situated, or, if they are unable to agree, by the department of public works.

The commission shall cause such public ways as it shall establish or alter under the provisions of this section to be constructed and graded so that they shall be reasonably safe and convenient for travel, and shall upon the completion of such ways give written notice to the selectmen of the town in which each such way or portion thereof is located that such way is open for travel, and thereafter such ways or parts thereof shall be maintained and kept in repair by the towns in which they are located. If however the total highway mileage other than state highways within such portion of any town as is not taken or acquired in fee under the second paragraph of section four of this act shall because of the relocations caused by the carrying out of this act exceed the mileage in such portion of said town at the time of the passage of this act, said commission shall pay to such town any amount which the governor and council shall deem proper for the added burden for the future care and maintenance of such additional highway mileage.

Any public ways or portions thereof within the area taken in fee by the commission shall, until such time as they may be discontinued as provided in this section, continue to be maintained as highways with the same rights and duties of counties, towns and other parties as before such taking, except that such public ways in the towns of Enfield, Greenwich and Prescott shall, after the annexation of said towns, as hereinafter provided, be maintained by the commission to the extent and in the manner provided in section seventeen of this act.

Sec. 9. If any burial ground, cemetery, grave or place of human burial is within the area taken in fee by the commission, or is located so near to the reservoir or other waterway as to be liable to pollute or reduce the quality or value of any such waters as a portable water supply, the commission shall remove the remains found in any such burial places. The

commission may agree with the next of kin, or other persons having the right to represent or dispose of such remains, as to the place or places to and in which such remains shall be removed and reinterred, and in such case the commission may pay the reasonable cost of a burial lot and shall pay the expenses reasonably necessary for such removal, including the removal and resetting of the gravestones, monuments and markers of such graves. In any case where such next of kin or other persons are unknown or unascertainable, or where there is no such agreement, the commission shall furnish a place or places for such reburials, and may establish a general burial ground or grounds therefor, and subject to the provisions of section thirty-five of chapter one hundred fourteen of the General Laws, may acquire by purchase or otherwise as provided by this act any lands needed therefor. Any such general burial ground or grounds shall upon their completion be transferred to such trustees, persons, municipalities or public officers as may be agreed upon by the parties at interest, and in case no such agreement is made, then to the body corporate or to the public officials charged with the care of cemeteries in the town in which such burial ground is located, and any such agreement or transfer shall include the transfer of any trust funds established for the benefit or care of the cemetery or lots therein which contained remains thus removed to such general burial ground and upon any such transfer of a general burial ground, the commission shall pay to the body corporate or public officials to whom such transfer is made such additional sum as the governor and council shall deem to be requisite and reasonable for the care, maintenance and preservation of such burial ground.

Such removal of bodies shall be made without undue delay upon the request of the descendants or relatives of such de-

ceased persons or of such persons as appear to the commission to be entitled to ask for such removal. Before any existing burial ground is submerged, all bodies, tombs and monuments shall be removed. After a suitable burial ground has been provided by the commission no burial shall be made in any burial ground which will be flowed or affected by the carrying out of this act, but the bodies of any persons which would otherwise be entitled to burial in such burial ground may be buried in such lot in the new burial ground as may be provided by the commission. To whatever cemetery a body may be removed, if the lot from which the body has been taken was under perpetual care, then the additional cost, if any, for perpetual care in the place of removal to an amount not exceeding one hundred dollars shall be provided by the commission for the lot to which removal has been made.

The commission in carrying out the provisions of this section shall conform to any reasonable requirements of the board of health of the town in which any burial ground so flowed or otherwise affected is situated.

Sec. 10. The commission may alter, relocate or discontinue the whole or any parts of any rights of way belonging to any railroad corporation or electric transmission company and in case of such alteration or relocation may construct upon existing or other locations parts of the railroad or transmission line to take the place of the parts so discontinued, or the railroad or transmission line, any part of which is taken, may in whole or in part be discontinued or abandoned as and in such manner as shall be mutually agreed upon by the commission and the board of directors of the railroad corporation or electric transmission company subject to such approval as is required by law of any state or federal authorities, and if the commission and such companies cannot agree thereon, then as and in

such manner as shall be determined, on the application in writing of either party, by the department of public utilities, which is hereby authorized and directed to adjudicate finally upon all questions relative thereto, subject to such approval of any federal authorities as is required by law. If the commission shall be of the opinion that any such alteration or construction requires that lands or rights therein be taken therefor, the commission may take or acquire by purchase or otherwise, as provided by this act, such lands or rights therein and may convey the same to the railroad corporation or electric transmission company to be thereafter held and used as the property of such corporation or company for railroad or transmission line purposes, and such railroad corporation or electric transmission company may file a description of said relocation with the county commissioners and may maintain and operate said relocated lines of railroad or transmission lines with the same powers, rights and duties as in the case of the original lines.

The provisions of section five of this act shall not apply to railroad corporations or to electric transmission companies engaged in supplying electricity in bulk, as such term is defined in section one of chapter one hundred and sixty-four of the General Laws, or to other public utilities directly engaged in interstate commerce.

In any claim by any railroad corporation or electric transmission company for damages arising from the carrying out of this act, the relocation of the railroad or electric transmission line right of way of such corporation or company may be shown in mitigation of damages.

Sec. 11. In carrying out the powers and duties conferred upon it by this act the commission may construct and maintain dams, buildings, machinery, roads, conduits and aqueducts, may

lay and maintain pipes, drains and wires, may alter or change the grade or direction of any water course, may carry and conduct any aqueduct, conduit, pipe, drain, or wire under or over any water course or any railroad, street or other way in such a manner as not unnecessarily to obstruct or impede travel thereon, may dig up any such road, street or way and lay, maintain and repair aqueducts, conduits, pipes, wires and other works, beneath the surface thereof, conforming to any reasonable regulations made by the mayor and aldermen of cities and the selectmen of towns, respectively, wherein such works are performed and restoring, so far as practicable, any such road, street, or way to as good order and condition as the same was in when such digging was commenced; may make such surveys and borings and do such other preliminary work on private lands as it may determine to be necessary or desirable, doing as little damage as possible and paying for the same; may enter upon and use land owned by others and, so far as practicable, shall heed all reasonable requests made by such owners; and in general may do any other act or thing necessary or proper for carrying out the powers and duties conferred upon it by this act.

The commission shall have exclusive right and control during construction and until turned over to the metropolitan district commission or to others as authorized in this act, of all properties, ponds, water sources, cemetery sites and other works of every description purchased or taken by the commission or constructed by it under this act, and may order any or all persons to keep from entry in or upon the same and shall, through their agents, have full power to carry out these provisions with respect thereto, and the courts having jurisdiction shall have full authority for the enforcement of the provisions of this section.

The commission shall provide, or may agree with the local authorities in any town in which work is done under this act to pay for such additional police protection as is made necessary by the doing of such work.

No town within which are included the areas of Enfield, Greenwich or Prescott taken in fee for reservoir purposes or for reservoir protection shall be required after the completion of the reservoir to bear any costs of or expenses for schools, policing or fire, gypsy moth or other insect pest protection within said reservoir areas described in this paragraph.

Sec. 12. Any town, other than Enfield, Greenwich or Prescott, from which any property which it holds in its private or proprietary capacity is taken under this act or which is otherwise constitutionally entitled to compensation for damage suffered under this act, may recover such damage from the commonwealth, in the manner provided by section four of this act.

Sec. 13. Upon the expiration of thirty days from the recording of an order of taking as provided by section four of this act by which taking, together with previous purchases or takings as provided by said section four, of land in the towns of Enfield, Greenwich and Prescott, the whole or a substantial part of said towns is taken, and after notice thereof to the towns to be affected by annexation as hereinafter described in this section, the territory within the towns of Enfield, Greenwich and Prescott shall be annexed to the adjacent towns, and to the counties in which such adjacent towns are located in the following manner:

(*a*) There shall be annexed to the town of New Salem, and thereby to Franklin county, those portions of the towns of Prescott, Greenwich and Enfield, being portions of Hampshire county, bounded as follows: beginning at the intersection of

the boundary lines of the towns of New Salem, Prescott and Shutesbury and following the existing channel of the west branch of the Swift river in a general southerly direction to its confluence with the Swift river; thence following the existing channel of the Swift river and its middle branch in a general northeasterly direction to the point where it is crossed by the boundary line between the towns of Prescott and Dana; thence following the boundary line between the towns of Prescott and Dana in a general northerly direction to its intersection with the boundary line of the town of New Salem; thence following the boundary line between the towns of New Salem and Prescott in a general westerly direction to the point of beginning.

(*b*) There shall be annexed to the town of Dana, and thereby to Worcester county, those portions of the towns of Prescott and Greenwich, being portions of Hampshire county, bounded as follows: beginning at the point where the middle branch of the Swift river crosses the boundary line between the towns of Dana and Prescott and following the existing channel of said middle branch in a general southerly direction to its confluence with the east branch of said river; thence following the existing channel of said east branch in a general northeasterly direction to the boundary line between the towns of Greenwich and Hardwick; thence following the boundary line between the towns of Greenwich and Hardwick in a general northeasterly direction to its intersection with the boundary line of the town of Dana; thence following the boundary line between the towns of Dana and Greenwich in a general northerly direction to its intersection with the boundary line of the town of Prescott; thence following the boundary line between the towns of Dana and Prescott in a general northerly direction to the point of beginning.

(*c*) There shall be annexed to the town of Hardwick, and thereby to Worcester county, that portion of the town of Greenwich, being a portion of Hampshire county, bounded as follows: beginning at the most westerly corner stone on the boundary line between the towns of Hardwick and Greenwich located about two-thirds of a mile southerly from the outlet of East pond; thence running due west ~~to~~ the existing channel of the east branch of the Swift river; thence following the existing channel of said east branch in a general northeasterly direction to its intersection with the boundary line between the towns of Hardwick and Greenwich; thence following said boundary line between the towns of Hardwick and Greenwich in a general southerly direction to the point of beginning.

(*d*) There shall be annexed to the town of Ware those portions of the towns of Greenwich and Enfield, all of said towns being in Hampshire county, bounded as follows: beginning at the aforesaid most westerly corner stone on the boundary line between the towns of Hardwick and Greenwich located about two-thirds of a mile southerly from the outlet of East pond; thence running due west to the existing channel of the east branch of the Swift river; thence following the existing channel of said east branch and of the Swift river in a general southwesterly direction to the intersection of the boundary line of the towns of Ware, Belchertown and Enfield; thence following the boundary line between the towns of Ware and Enfield in a general easterly direction to its intersection with the boundary line of the town of Hardwick; thence following the boundary line between the towns of Hardwick and Enfield in a general northerly direction to its intersection with the boundary line of the town of Greenwich; thence following the boundary line between the town of Hardwick and Greenwich in a general northerly direction to the point of beginning.

(*e*) There shall be annexed to the town of Belchertown that portion of the town of Enfield, both of said towns being in Hampshire county, bounded as follows: beginning at the intersection of the boundary lines of the towns of Belchertown, Pelham and Enfield; thence running due east to the existing channel of the west branch of the Swift river; thence following the existing channel of said west branch and of the Swift river in a general southerly direction to the boundary line between the towns of Belchertown and Enfield; thence following the boundary line between the towns of Belchertown and Enfield in a general northwesterly direction to the point of beginning.

(*f*) There shall be annexed to the town of Pelham that portion of the town of Enfield, both of said towns being in Hampshire county, bounded as follows: beginning at the intersection of the boundary lines of the towns of Belchertown, Pelham and Enfield; thence running due east to the existing channel of the west branch of the Swift river; thence following the existing channel of said west branch in a general northerly direction to the intersection of the boundary lines of the towns of Prescott, Pelham and Enfield; thence following the boundary line between the towns of Pelham and Enfield in a westerly and southerly direction to the point of beginning.

Sec. 14. All the property belonging to the towns of Enfield, Greenwich and Prescott shall upon the annexation of said towns to adjacent towns by authority of this act, vest in and become the property of the commonwealth for the benefit of the metropolitan water district, and the commonwealth shall succeed to all the rights, claims and causes of action of each of said towns, and shall assume and be liable for all the debts, obligations, trusts, duties and liabilities of each of said towns. All actions and causes of actions by or against the said towns

of Enfield, Greenwich and Prescott pending or accrued, when such annexation takes effect, shall survive, and may be prosecuted to final judgment and execution by or against the commonwealth. All books, papers, monies and other property in the possession of the treasurer of each of these three towns or of any town officer thereof shall be turned over to the commission at the time of said annexation, and the commission shall wind up and liquidate the affairs of each such town as speedily as possible. Upon the final liquidation of the affairs of the towns of Enfield, Greenwich and Prescott, the commission shall turn over such of the records of said towns respectively as are of permanent value to the towns of Belchertown, Dana and New Salem, respectively, and said records shall be preserved with the records of the town to which they have been so turned over.

Upon such annexation the division of accounts of the department of corporations and taxation shall audit the books and accounts of the collector of taxes of each of the towns of Enfield, Greenwich and Prescott, respectively, and all taxes assessed for the year of such annexation and remaining uncollected, except taxes assessed upon property acquired by the commission under the second paragraph of section four of this act, to persons residing on property located within the territory annexed to another town shall be, by the assessors of the town in which such taxes were assessed, committed to the collector of taxes of the town to which such territory is by the provisions of this act annexed. It shall be the duty of any collector of taxes to whom any such taxes are committed to complete the collection of such taxes with legal interest and costs and pay over the same to the treasurer of the town for which he is the collector.

Upon the annexation to adjacent towns of the territory

within the towns of Enfield, Greenwich and Prescott as set forth in this act, the commission or the metropolitan district commission shall yearly in the month of November reimburse each of said adjacent towns for all money paid out or expenses incurred under the laws of the commonwealth for the year preceding in the relief or aid of persons whose settlement was gained in whole or in part whether by original acquisition or derivation within the territory annexed to each of said towns respectively prior to the date of such annexation.

Sec. 15. Annexation under this act shall constitute the annexed territory part of the town and the county to which it is annexed with respect to the jurisdiction of the courts, as well as for all other purposes. All suits, proceedings, complaints and prosecutions, and all matters of probate, which shall be pending at the time of such annexation before any court or trial justice, or such matters as may be incident thereto, may however be heard and determined and prosecuted to final judgment and execution before such court or justice as if said annexation had not taken place; but upon such annexation taking place, the several courts and trial justices having jurisdiction over the respective towns to which the territory within said towns of Enfield, Greenwich and Prescott is annexed shall have jurisdiction of all civil actions, matters of probate and insolvency and criminal prosecutions thereafter begun, although the cause of action has accrued, or crime, offense or misdemeanor has been committed, before such annexation, in the same manner and to the same extent as if such territory had been annexed prior to the accrual of the cause of action or the commission of the crime, offense or misdemeanor.

Sec. 16. An inhabitant of the town of Enfield, Greenwich or Prescott, when annexed to an adjacent town by authority

of this act, who remains upon the annexed territory, or who removes to a place within the limits of the town to which the land upon which he resided has been annexed, as such limits existed prior to such annexation, shall have the same right to vote at a town meeting in such town, or at an election of town officers, that he would have had if the annexed territory had constituted a part of said town for six months prior to such meeting or election.

Sec. 17. During any interval between the annexation of said towns of Enfield, Greenwich and Prescott and the taking possession of the land taken therein by the commission under this act, the commission shall maintain the public ways, public schools and other public works and public institutions in said towns to such extent and in such manner as the commission may deem necessary for the convenience, comfort and welfare of the inhabitants remaining therein.

Sec. 18. No person shall acquire against the commonwealth any rights by prescription or adverse possession in any lands or rights in lands of the commonwealth acquired by the commission under the provisions of this act or of chapter three hundred and seventy-five of the acts of nineteen hundred and twenty-six.

Sec. 19. The commission may at any time sell at public or private sale, or exchange or lease any property, real or personal, or any easement or water right including any land in new cemeteries provided for in section nine of this act, whether taken by eminent domain or otherwise acquired, which in the opinion of the commission is no longer needed for the purposes of this act. Any sums of money so received shall be applied by the state treasurer to construction costs or to reduce the bonded indebtedness for the works. The commission, and

after said works have been turned over to the metropolitan district commission, the metropolitan district commission, may by lease, license or contract permit the construction and maintenance on or over any land or waters under its control, of towers, poles, wires and other structures for the purpose of transmitting electric power, and may construct, maintain and operate such power plants and other structures as may in its opinion be necessary to utilize the fall of water created at any of the dams, channels, tunnels, or other structures under its control, for the production of power or electricity; may locate, construct and maintain lines for transmitting the same; and may use, sell or contract for the sale or use of any power or electricity so created, and any sums of money so received shall be applied to reduce the charges of maintenance of the metropolitan water district.

Sec. 20. The provisions of sections six and seven of chapter fifty-nine of the General Laws shall be applicable to land acquired in fee by the commission under this act for reservoir purposes or for the protection of the reservoir except to land within the present limits of the towns of Enfield, Greenwich and Prescott. On the land in these three named towns acquired previous to the date of their annexation, the commission shall pay to each said town in which the respective land is located until such time as the annexation of said town, as provided in section thirteen of this act, a sum in lieu of taxes computed and paid as provided in said sections six and seven of said chapter fifty-nine, but including for this period the buildings and structures thereon. Subsequent to said annexation neither the commission nor the metropolitan district commission shall pay any taxes or make any payments in lieu of taxes on land or buildings within the present limits of the said towns of Enfield, Greenwich and Prescott.

As full compensation for any loss of taxation or any other loss caused by the carrying out of the provisions of this act, the commission shall pay to the county of Hampshire the sum of fifty-five thousand dollars, which sum shall be paid at the time of the annexation of the towns of Enfield, Greenwich and Prescott to adjacent towns.

Sec. 21. Whenever by the provisions of this act the commission is required to make annual payments over a period of years, it may by agreement with the parties interested make a settlement by payment of a liquidated amount, if it deems it advisable so to do.

Sec. 22. Any town or fire or water district on the water shed of the Swift river may take from this river above any dam constructed under this act across said river so much of the water thereof as it has already been or may hereafter be authorized by the legislature to take for supplying its inhabitants with water, and in case any such town or district shall hereafter on its application therefor be authorized to take such water, the point of connection with and entrance into said river or any pond, reservoir or waters thereof and the location of any pipes, aqueducts, conduits, wells or other water courses laid or constructed on land of the commonwealth shall be determined by agreement between such town or district and the metropolitan district commission, and such town or district shall pay to the commonwealth for the account of the metropolitan water district, all damages to the land, structures or other property of the commonwealth caused by such taking, connection or entrance; and it shall further pay to the commonwealth for the account of the metropolitan water district, a fair proportion of the cost incurred by the commonwealth for the acquisition under the provisions of this act of the waters of said river, or rights therein, and for the construction, maintenance and

operation of such works and structures as are authorized by this act, including a fair proportion of the cost of maintaining the purity of said water, the said damages and proportion to be determined by the metropolitan district commission and by such applicant town or district, and, if they cannot agree, such damages and proportion shall be determined by a master to be appointed by the supreme judicial court on petition by the commonwealth or said applicant town or district, and the report of the master, when affirmed by said court, shall be final and conclusive upon all parties.

Sec. 23. No persons shall, after the passage of this act, erect a dam for mill purposes across the Swift river, or any of its tributaries above the village of Bondsville, without the consent in writing of the commission, or, after said works have been turned over to the metropolitan district commission, of said metropolitan district commission. In granting its consent, either commission may impose such conditions as it may deem to be for the public interest. Any person who is constitutionally damaged in his property by the refusal of such consent or by the imposition of such conditions, may recover from the commonwealth the damage so caused in the manner provided in section four of this act.

Sec. 24. The supreme judicial court or any justice thereof and the superior court or any justice thereof, during a sitting of the court or in vacation, on the petition of the commission or of any city, town, corporation or person interested, or of the attorney of any such petitioner, shall have jurisdiction in equity or otherwise to enforce the provisions of this act and of any rule, regulation or order made under the authority of the same and to prevent any violation of said provisions, rules, regulations or order; provided, however, that no suit in which the right of the commission to make any taking authorized by

this act is questioned shall be brought except in the supreme judicial court for the county in which said taking has been made or is to be made, nor unless the said suit is brought within six months after the passage of this act.

If any part, subdivision or section of this act shall be declared unconstitutional the validity of its remaining provisions shall not be affected thereby.

Sec. 25. All general laws relating to the water supplies of cities and towns or the lands and other property used for such supplies and the provisions of sections ten to twenty-three, inclusive, of chapter ninety-two of the General Laws shall in so far as they are not inconsistent with the provisions of this act apply to and be observed in carrying out the purposes of this act. The provisions of chapter three hundred and seventy-five of the acts of nineteen hundred and twenty-six shall continue in force except as modified by the provisions of this act, but nothing in this act shall be held to authorize any taking or diversion of the waters of the Ware river in excess of that authorized under the provisions of said chapter three hundred and seventy-five of the acts of nineteen hundred and twenty-six.

Sec. 26. Any church or religious society established in the towns of Dana, Enfield, Greenwich, New Salem or Prescott may within five years from the passage of this act file in the probate court or in the supreme judicial court for the county in which such town is located a petition in equity representing that by reason of the construction of the reservoirs and other works contemplated by this act it will be impracticable for such church or religious society thereafter to continue its services of worship or otherwise to carry out the purposes for which it was established and thereupon, after such notice to the attorney general and other persons interested as the court in which such petition is filed may direct, said court may

authorize such church or religious society to convey by deed all property real and personal held by it for its own purposes or upon any trust (including the beneficial interest in any trust property held for the benefit of such church or religious society, also any and all contingent rights and interests and any right to damages vested in such church or religious society under the terms of chapter three hundred and seventy-five of the acts of nineteen hundred and twenty-six or under the terms of this act) to such appropriate person or corporation as the court may determine, to be held and administered by such person or corporation in such manner and upon such trusts as the court may designate and may further direct that upon the making of such conveyance and upon the filing of a certified copy of the deed and of the decree authorizing the same in the office of the secretary of the commonwealth such church or religious corporation shall be deemed to be dissolved. If any property conveyed pursuant to a decree entered upon such petition shall thereafter be taken under the provisions of either of said acts, the person or corporation to which such property shall have been so conveyed shall have the same right to damages as such church or religious society would have had if it had not conveyed such property. Before entering a decree as hereinbefore provided, the court shall ascertain whether any rights by way of reverter or otherwise are vested in any person or corporation in any property held by or for the benefit of such church or religious society upon the dissolution of such church or religious society, the discontinuance of its activities, its ceasing to use said property or any other contingency, and, if it shall appear that a conveyance of any such property as hereinbefore provided would be inconsistent with any such rights, the court, if any action appears to be necessary in order to effect a lawful and complete disposition of such property,

shall direct that the same be conveyed to the person or corporation found to be entitled thereto in the existing state of things or devise a plan for the application thereof in a manner consistent with such rights. The remedies hereby given shall be in addition to any remedies afforded by existing law.

Sec. 27. For the purpose of carrying out the provisions of this act, the commission may expend such amounts not exceeding in the aggregate fifty million dollars, as may from time to time be approved by the governor and council. To meet such expenditures, the state treasurer shall, from time to time, on the request of the commission and subject to such approval, issue bonds of the commonwealth to an amount not exceeding the sum of fifty million dollars, which shall be a further addition to the loans authorized by section eight of chapter three hundred and seventy-five of the acts of nineteen hundred and twenty-six, and by section six of chapter one hundred and eleven of the acts of nineteen hundred and twenty-seven.

Such bonds shall be issued as coupon or registered bonds, for such term of years as may be recommended by the governor, in accordance with section three of Article LXII of the amendments to the constitution, and shall bear interest at such rate as shall be fixed by the state treasurer, with the approval of the governor and council. The amounts necessary to meet interest and serial payment requirements on said bonds and the expenses of maintaining and operating the works to be constructed by the commission under this act, and such other expenses as may be authorized hereunder, shall be added to the annual assessments upon the cities and towns comprising the metropolitan water district and apportioned and collected as provided by section twenty-six of chapter ninety-two of the General Laws.

Approved April 26, 1927.

EXHIBIT "C"

LAWS FOR THE PROTECTION AND PRESERVATION OF THE NAVIGABLE WATERS OF THE UNITED STATES

Extract from the River and Harbor Act Approved March 3, 1899.

30 Stats. L., vol. 30, pp. 1151-1155.

Construction of bridges, consent of Congress necessary for.

SEC. 9. That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: *Provided,* That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced: *And provided further,* That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the

Bridges may be built under State legislation.

Plans must be approved before construction is begun.

Approved plans must be adhered to.

modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War.

Creation of obstructions forbidden.

SEC. 10. That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same.

Construction of wharves, etc.

Alteration etc., of channels.

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CHARLES ELMORE
CL

Supreme Court of the United States

OCTOBER TERM, 1929

~~12~~

No. 12, ORIGINAL

THE STATE OF CONNECTICUT, COMPLAINANT

v.

THE COMMONWEALTH OF MASSACHUSETTS, DEFENDANT

IN EQUITY

MOTION FOR LEAVE TO FILE MOTION TO DISMISS DEFENDANT'S ANSWER.

MOTION TO DISMISS DEFENDANT'S ANSWER.

BENJAMIN W. ALLING,
Attorney General of the State of Connecticut and Solicitor and Counsel for the Plaintiff.

ERNEST L. AVERILL,
Deputy Attorney General of the State of Connecticut.

BENEDICT M. HOLDEN,
of Counsel.

THE CASE, LOCKWOOD & BRAINARD CO.
HARTFORD, CONN.

In the
Supreme Court of the United States

No. 13, ORIGINAL

STATE OF CONNECTICUT, COMPLAINANT

v.

COMMONWEALTH OF MASSACHUSETTS,
DEFENDANT

NOTICE

To the Commonwealth of Massachusetts, defendant herein, and to the Honorable Joseph W. Warner, Attorney General of said State and solicitor of the Defendant:

You will please take notice that at the incoming of the Supreme Court of the United States, at 12:00 o'clock M., at the Capitol Building in the City of Washington, District of Columbia, upon Monday, November 4, 1929, or as soon thereafter as solicitors can be heard, the above named complainant will appear by its solicitors and present to said court the motion of said complainant to dismiss the defendant's answer to the bill of complaint, and ask leave of Court to file the same; and further request that leave be granted to argue said motion orally and that a time be fixed for such purpose; a copy of which motion to dismiss is presented herewith; when and where you may be present if you so desire.

BENJ. W. ALLING,
Attorney-General,
State of Connecticut.

By ERNEST L. AVERILL,
Deputy Attorney-General.

STATE OF MASSACHUSSETTS

COUNTY OF

Service of the above motion, by the delivery to me of a copy thereof, with a copy of the aforesaid motion to dismiss, is hereby acknowledged, this day of 1929.

.....

Attorney-General of Massachusetts.

In the
Supreme Court of the United States

OCTOBER TERM, 1929

Original No. 13

IN EQUITY

STATE OF CONNECTICUT, COMPLAINANT

v.

COMMONWEALTH OF MASSACHUSETTS,
DEFENDANT

MOTION FOR LEAVE TO FILE — MOTION TO DISMISS DEFENDANT'S ANSWER

The State of Connecticut, by its attorney-general, appearing in that behalf by and with the authority, consent and direction of the governor of said state, comes now here and presents this its motion for leave to file in this court a motion to dismiss the defendant's answer and further requests that said motion to

dismiss be argued orally and a time fixed for such purpose. A true copy of said motion is hereto attached.

STATE OF CONNECTICUT,

By BENJAMIN W. ALLING,
Its Attorney-General.

ERNEST L. AVERILL,
Deputy Attorney-General.

BENEDICT M. HOLDEN,
of Counsel.

In the
Supreme Court of the United States

NO. 13. ORIGINAL

STATE OF CONNECTICUT, COMPLAINANT

v.

COMMONWEALTH OF MASSACHUSETTS,
DEFENDANT

MOTION TO DISMISS DEFENDANT'S ANSWER.

And now comes the State of Connecticut, by Benjamin W. Alling, its Attorney-General, and moves to dismiss the answer heretofore filed by leave of this Court by the Commonwealth of Massachusetts, and for cause of said motion says:

1. The said answer does not allege sufficient facts to constitute a defense to the bill of complaint filed by the State of Connecticut.

2. The defendant acknowledges in paragraph two of its answer the superior power of the Government of the United States over waters within one of the United States in so far as regulatory power is given to the Government of the United States under the Constitution of the United States; and admits in paragraph five of the answer having filed applications with the Secretary of War for permits to make certain diversions of the Swift River and the Ware River; and said defendant also confesses in paragraph five of the answer that said permission had not been obtained from the Congress of the United States, the War Department or from the Secretary of War.

3. The defendant admits in paragraph seventeen on page eighteen of the printed answer that it proposes to erect dams in the valley of the Swift River for the purpose of withholding the flow of said river and diverting the waters therefrom to a reservoir about to be constructed; and that it proposes to store in said reservoir the waters of the Swift River and certain waters of the Ware River; and that said project is now in the course of execution; all of which has been done and is being done without authorization of the Congress of the United States or permission of the Secretary of War, or the approval of the Chief Engineers, and against the will of the State of Connecticut.

4. It appears from the allegations of the Answer that the Commonwealth of Massachusetts proposes to construct a diversion dam in the waters of the Ware River, which is acknowledged by the Commonwealth of Massachusetts to be within the jurisdiction of the United States as navigable waters of the United States, which construction is forbidden by Section 9 of the River and Harbor Act approved March 3rd, 1899, until the consent of Congress to the building of such structure shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War and nowhere in said Answer does it appear that the consent of Congress has been obtained for such construction and nowhere does it appear that plans have either been submitted to or approved by the Chief of Engineers and by the Secretary of War.

5. It appears from the allegations of the Answer of the Commonwealth of Massachusetts — that the navigable capacity of the Connecticut River and one of its tributaries known as the Ware River, which are admitted to be waters of the United States, is to be obstructed by the construction of a diversion dam and the permanent removal of water from these water courses

but nowhere in said Answer does it appear that this proposed obstruction has been affirmatively authorized by Congress as provided in Section 10 of the River and Harbor Act approved March 3rd, 1899, altho by the provisions of said Section 10 the creation of any such obstruction not affirmatively authorized by Congress is prohibited.

6. It appears from the allegations of the Answer of the Commonwealth of Massachusetts that it is proposed by it to alter and modify the capacity of the channel of navigable waters of the United States, in that it is proposed to take and carry away water from the Ware River and in this manner prevent it from flowing into and becoming navigable waters of the Connecticut River but nowhere in said answer does it appear that the work has been recommended by the Chief of Engineers and authorized by the Secretary of War, contrary to the provisions of Section 10 of the River and Harbor Act approved March 3rd, 1899.

7. It appears from the allegations of the Answer that the Commonwealth of Massachusetts proposes to construct dams in the waters of the Swift River, which is acknowledged by the Commonwealth of Massachusetts to be within the jurisdiction of the United States as navigable waters of the United States, which construction is forbidden by Section 9 of the River and Harbor Act approved March 3rd, 1899, until the consent of Congress to the building of such structure shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War and nowhere in said Answer does it appear that the consent of Congress has been obtained for such construction and nowhere does it appear that plans have either been submitted to or approved by the Chief of Engineers and by the Secretary of War.